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3 **BEFORE THE FEDERAL ELECTION COMMISSION**

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COMMISSION
SECRETARIAT

4 In the Matter of)

5 Taxpayer Network)

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COMMISSION

8 **SECOND GENERAL COUNSEL'S REPORT**

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10 **I. ACTIONS RECOMMENDED**

11 (1) Deny Taxpayer Network's request that the Commission find no probable cause to
12 believe that it violated 2 U.S.C. §§ 434(f) and 441d; (2) enter into conciliation with Taxpayer
13 Network prior to a finding of probable cause to believe

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15 **II. DISCUSSION**

16 **A. Background**

17 The Commission previously found reason to believe that Taxpayer Network
18 ("Respondent") violated 2 U.S.C. §§ 434(f) and 441d of the Federal Election Campaign Act of
19 1971, as amended, (the "Act") by failing to report and include complete disclaimers on two
20 television advertisements criticizing U.S. Senate candidate Barbara Boxer ("Boxer ads") that
21 qualified as electioneering communications. See Certification (June 22, 2011) and First Gen.
22 Counsel's Rpt. at 3. The Commission also authorized an investigation to determine the amount
23 of money spent to air these communications. In response to a subsequent discovery request,
24 Taxpayer Network stated that it spent \$192,185 on the unreported communications. See Supp.
25 Resp. (October 25, 2011).

26 Taxpayer Network also filed a "Response to RTB Findings" arguing that the Commission
27 should find no probable cause to believe that there was any violation of the Act because the
28 Commission lacks jurisdiction to enforce the statutory disclosure and disclaimer requirements for

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electioneering communications that do not constitute express advocacy or its functional equivalent. See RTB Resp. (Sept. 14, 2011).

As detailed below, we recommend that the Commission deny Respondent's request to find no probable cause and instead enter into pre-probable cause conciliation with Taxpayer Network.

B. Legal Analysis

Taxpayer Network's argument that the Commission has no jurisdiction over electioneering communications such as the Boxer ads that do not contain express advocacy or its functional equivalent lacks merit. Respondent's assertion that there is no Supreme Court opinion directly upholding the constitutionality of the statutory and regulatory "electioneering communication" provisions as applied to such electioneering communications is belied by *Citizens United v. FEC*, 130 S. Ct. 876 (2010) ("*Citizens United*").

In *Citizens United*, the Supreme Court expressly affirmed the validity of disclosure and disclaimer requirements for all electioneering communications, including those that were not the functional equivalent of express advocacy. 130 S. Ct. at 914-16; see also *Real Truth About Abortion (f/k/a Real Truth About Obama) v. FEC*, No. 11-1760, slip op. at 14 (4th Cir. June 12, 2012) (discussing *Citizens United* holding concerning electioneering communications). The Court upheld the disclosure requirements as applied not only to *Hillary: The Movie*, which contained the functional equivalent of express advocacy, but also to three advertisements for the movie that did not. 130 S. Ct. at 912-15. The Court found that, although the advertisements were commercial, they fell within the definition of "electioneering communication," and therefore required disclaimers under 2 U.S.C. § 441d. *Id.* at 914.

1 The Court then directly addressed and explicitly rejected the argument that the disclosure
2 requirements at 2 U.S.C. § 434(f) apply only to the functional equivalent of express advocacy:

3 As a final point, Citizens United claims that, in any event, the disclosure
4 requirements in §201 must be confined to speech that is the functional equivalent
5 of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's
6 restrictions on independent expenditures to express advocacy and its functional
7 equivalent. [*Internal citation omitted.*] Citizens United seeks to import a similar
8 distinction into BCRA's disclosure requirements. We reject this contention.

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10 *Id.* at 915. In so holding, the Court expressly rejected the argument put forward by Citizens
11 United, similar to the one presented by Taxpayer Network in its RTB Response, that the Court in
12 prior opinions had drawn a bright line between communications that do and do not contain
13 express advocacy or its functional equivalent, and that the line extends beyond prohibitions on
14 corporate or union funding to disclosure requirements. *Id.*

15 The Supreme Court recognized that disclosure and disclaimer requirements place some
16 burden on speech but noted that they "impose no ceiling on campaign-related activities" and "do
17 not prevent anyone from speaking." *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)
18 and *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). Applying an "exacting scrutiny" standard,
19 which requires a substantial relation between the disclosure requirement and a sufficiently
20 important governmental interest, the Court held that even where an advertisement is a
21 commercial transaction – and does not contain the functional equivalent of express advocacy –
22 the public has an interest in knowing who is speaking about a candidate in the time leading up to
23 the election, and that the communications are not funded by a candidate or political party. *Id.*
24 at 915. Accordingly, the Court concluded that the government has a valid interest in requiring
25 disclosure of and disclaimers on all electioneering communications, including those that do not
26 contain the functional equivalent of express advocacy. *Id.* at 915-16.

Thus, the Court affirmed that the Commission has jurisdiction over all advertisements that constitute electioneering communications, not just those electioneering communications containing the functional equivalent of express advocacy as Respondent contends. *Id.* Accordingly, the Commission has jurisdiction over Taxpayer Network in this matter on the basis of Respondent's electioneering communications, and the Commission may enforce the provisions of 2 U.S.C. §§ 434(f) and 441d in this matter as to the Boxer Ads. We therefore recommend that the Commission deny Respondent's request to find no probable cause. Since Taxpayer Network has provided the costs associated with the Boxer Ads, we also recommend that the Commission enter into conciliation with Taxpayer Network prior to a finding of probable cause.

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General Counsel's Report #2
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IV. RECOMMENDATIONS


1. Deny Taxpayer Network's request to find no probable cause to believe that it violated 2 U.S.C. §§ 434(f) and 441d.
2. Enter into conciliation with Taxpayer Network, prior to a finding of probable cause to believe.
- 3.
4. Approve the appropriate letter.

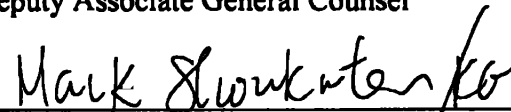
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